IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 316 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DAVE KAUSHIKKUMAR PREMSHANKER

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 316 of 1994

MR JM PANCHAL for the appellant

Mr. A.J. Desai, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 24/06/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Original accused No.1 has filed this appeal under Section 374(2) of the Code of Criminal Procedure, 1973, against the judgment and order dated February 9, 1994, passed by the learned Additional Sessions Judge, Mehsana, Camp at: Patan, in Sessions Case No.203 of 1993, by which judgment and order, the appellant was convicted under Sections 201, 498A and 302 of the Indian Penal Code and sentenced to undergo the imprisonment of life.

2. It is the case of the prosecution that the appellant along with his father and mother, Shantaben Premshanker Dave (original accused No.2), resided at village Narsinhpura, Taluka: Kadi, District: Mehsana. The marriage between the appellant and Dakshaben, daughter of P.W.4, Himmatlal Jatashanker Bhatt, was solemnized on May 19, 1991. Out of the wedlock, Dakshaben had given birth to a female child, Krupa, who was aged about one year on the date of the incident, i.e. June 6, 1993. As per the prosecution case, deceased Dakshaben was treated with cruelty by the mother-in-law and the appellant. She had written letters to her father and had also orally complained about the cruelty meted out to her by the appellant and his mother. It is alleged that, on June 6, 1993, at about 10 p.m. the original accused No.2, Shantaben Premshanker Dave, started quarreling with the deceased. At that time, the appellant was present in the house and he also started quarreling with deceased Dakshaben and told her to go to her parents house. The appellant, thereafter, got enraged and poured kerosene, which was filled in a small tin, on the body and clothes of deceased Dakshaben and set her ablaze. It is alleged that, when the deceased tried to come out of the kitchen, the appellant had pushed her into the kitchen. Thereafter, deceased Dakshaben was brought to Kadi in a jeep and was admitted in Bhagyoday Hospital, Kadi, and an accidental entry was made at the Kadi Police Station through the message conveyed by P.W.2, Dr. Tejas Patel (Exh.22). P.W.13, PSI, S.B. Trivedi, entered the incident as accidental entry at Case no.82/92 and went to Bhagyoday Hospital where he recorded the statement of deceased Dakshaben. Before going to the Hospital, P.W.13, PSI, S.B. Trivedi, informed a worker of Social Defence Organization, Ms. Ritaben Vyas, P.W.11, who had also accompanied the PSI to the Hospital. The statement of the deceased was recorded by the PSI wherein she had stated that, when she was preparing tea on a kerosene stove at her residence around 10 p.m., she sustained burn injuries as the polyster saree put on by her caught flames of the stove. The said statement was also endorsed by the social defence worker,

Ms. Ritaben Vyas, P.W.11, who was also a practising advocate. P.W.13 PSI, S.B. Trivedi had also sent yadi to the Executive Magistrate, Kadi, and a dying declaration was recorded by the Executive Magistrate, Kadi, which was produced at Exh.71 on the record of the case. In the dying declaration also, deceased Dakshaben had made statement that she had sustained burn injuries while she was preparing tea in her house around 10 p.m.

3. As deceased Dakshaben had sustained serious burn injuries, Dr. Tejas Patel advised the appellant to take her to Ahmedabad and get her admitted in the Civil Hospital. Accordingly, deceased Dakshaben was taken to the Civil Hospital, Ahmedabad. It is the prosecution case that deceased Dakshaben was, thereafter, shifted to a private clinic, i.e. Dr. Jarmarwala Hospital, near Ambawadi, Ahmedabad, and was admitted in the said Hospital on June 7, 1993 at 11.00 a.m. The appellant had also sustained injuries on both the hands and, therefore, he was also admitted in the said Hospital and was discharged in the evening of June 11, 1993. The father and the brother along with other relatives of the deceased, on receipt of the information about the deceased having sustained burn injuries, went to Kadi and, thereafter, went to Civil Hospital, Ahmedabad, and, when they were informed that deceased Dakshaben was admitted in Dr. Jarmarwala Hospital, came to the Hospital of Dr. Jarmarwala. It is the prosecution case that the deceased, for the first time, on June 10, 1993, in the late night hours, informed the father and the brother that she had made a statement to the Executive Magistrate on June 6, 1993 that she had sustained burn injuries while she was preparing tea, since she was under the pressure of the appellant and she was threatened by the appellant to make such statement, otherwise, the life of the daughter of deceased Dakshaben would be in danger. She made the statement before her brother and father for the fist time that the appellant and his mother Shantaben had quarreled with her in the night of June 6, 1993; and the appellant had poured kerosene on her clothes and body and, thereafter, she was set ablaze. Thereafter, P.W.5, Prakash Himatlal Bhatt, brother of deceased Dakshaben, in the company of one Ashwinikumar Dave, went to the Kadi Police Station and lodged a report before the P.W.13 PSI, S.B. Trivedi, around 2.30 a.m. on June 11, 1993. P.W.13 PSI, S.B. Trivedi immediately informed the social defence worker, P.W.11 Ms. Ritaben Vyas that they were required to go to Ahmedabad to record the statement of deceased Dakshaben. P.W.13 PSI, S.B. Trivedi, accompanied by P.W.11 Ms. Ritaben Vyas, came to the Hospital of Dr. Jarmarwala. PSI, S.B. Trivedi,

recorded the statement of deceased Dakshaben around 4.30 a.m. on June 11, 1993. Below the said statement, P.W.11 Ms. Ritaben Vyas made an endorsement. Dr. Jarmarwala had also made an endorsement that deceased Dakshaben was fully conscious at 4.30 a.m. Immediately thereafter, yadi was sent to the Executive Magistrate with a request to come and record dying declaration of deceased Dakshaben. In the said yadi, Dr. Jarmarwala made endorsement that the patient was conscious. The said endorsement was made around 11.00 a.m. The said yadi was received by P.W.3, Rameshchandra Parshottam Patel, Executive Magistrate, around 12.45 p.m. on June 11, 1993. P.W.3, R.P. Patel immediately went to the Hospital of Dr. Jarmarwala, and enquired from Dr. Jarmarwala whether the patient was in a fit state of mind. After ascertaining that deceased Dakshaben was fully conscious and in a fit state of mind, P.W.3, Executive Magistrate, R.P. Patel, started recording of dying declaration of deceased Dakshaben at 13.05 hrs. In the said dying declaration, deceased Dakshaben stated that the incident had taken place on June 6, 1993 at 10 p.m. at village Narsinhpura, and, at that time, she had put on a coffee colour polyester saree and coffee colour blouse. She stated that the quarrels used to take place between her and the mother in law and she was treated with cruelty by the mother in law and the appellant. She stated that, on the night of June 6, 1993, the mother in law had quarrelled with her and the appellant had also started quarreling with her and, in that process, the appellant got enraged and poured kerosene stored in a small tin and the mother in law and the appellant set her ablaze. She also stated that when she tried to come out of the kitchen, the appellant caught hold of her. She stated that she was brought to Bhagyoday Hospital, Kadi, in a jeep owned by the friend of the appellant. In the dying declaration, she also made statement that she was treated with cruelty by the appellant and her mother in law. The dying declaration of the deceased was produced as duly proved by P.W.3, R.P. Patel, at Exh.30. The said declaration was attested by the two witnesses, namely, (i) I.H. Dave, Clerk, having his office at M.S.Building, at Ahmedabad, and (ii) Manjula Vyas. It is pertinent to note that the copy of the said dying declaration, which was supplied to the appellant, did not bear the signatures of the two attesting witnesses, namely, I.H. Dave and Manjula Vyas. The said copy of the dying declaration which was supplied to the appellant was also admitted in evidence at Exh.31. An offence was registered by P.W.13 PSI, S.B. Trivedi, of Kadi Police Station, against the appellant and his mother, Shantaben, under Sections 498A and 307 of the Indian Penal Code.

The appellant and his mother came to be arrested on the night of June 11, 1993. Deceased Dakshaben expired on June 14, 1993, in the Hospital of Dr. Jarmarwala. After the death of Dakshaben, a case of murder was registered against the appellant and his mother at Kadi Police Station. The dead body of deceased Dakshaben was sent for post-mortem to the V.S. Hospital. P.W.13 PSI, S.B. Trivedi, had drawn panchanama of place of incident at village Narsinhpura where it was found that, after the incident, the place of the incident was washed and all the incriminating articles were removed from that place. P.W.13 PSI, S.B. Trivedi, recorded statement of witnesses. After collecting post-mortem report and the report of the FSL, charge-sheet came to be filed against the appellant and his mother, Shantaben, for the offences under Sections 302, 498A and 201 of the Indian Penal Code.

4. Charge Exh.7 was framed against the appellant and his mother, Shantaben Premshanker Dave, at Exh.7, for offences under Sections 302, 498A and 201 of the Indian Penal Code. To prove the charge against the appellant and his mother, Shantaben, the prosecution had led oral as well as documentary evidence. Both the accused persons were questioned with regard to incriminating evidence led against them and their statements came to be recorded under Section 313 of the Code of Criminal Procedure.

5. On appreciation of evidence led by the prosecution, the learned Additional Sessions judge, came to the conclusion that the dying declaration and the statement before P.W.13 PSI, S.B. Trivedi, made by deceased Dakshaben, at Kadi, were made under pressure and influence of the appellant and they were not voluntary. The learned Additional Sessions Judge held that the statement made before P.W.13 PSI,S.B. Trivedi, at Ahmedabad, in the early morning hours of June 11, 1993 and the dying declaration recorded by Executive Magistrate, R.K. Patel, at Ahmedabad, were voluntary statements made by deceased Dakshaben which implicated the appellant. The learned Additional Sessions Judge held that the deceased was meted out with cruelty by the appellant and the deceased was set ablaze by the appellant on June 6, 1993 at 10 p.m. in his residence at village Narsinhpura by pouring kerosene on her. It is further held by the learned Additional Sessions Judge that the appellant had destroyed evidence against him by cleaning the place of incident and removing all incriminating articles from that place. However, the learned Additional Sessions Judge, surprisingly,

acquitted original respondent No.2, the mother of the appellant, Shantaben Dave, from the charges against her on the same set of evidence. It may be stated that the State of Gujarat had filed Criminal Appeal No.685 of 1994 against the order of acquittal recorded by the learned Additional Sessions Judge acquitting the original accused No.2, Shantaben Dave, from the charges under Sections 302, 498A and 201 of the Indian Penal Code, which came to be dismissed by the Division Bench of this Court vide order dated July 22, 1996. The appellant was convicted of the offence under Sections 302, 498-A and 201 of the Indian Penal Code, and sentenced to undergo R.I. for life for the offence under Section 302 of the Indian Penal Code; S.I. for one year and fine of Rs.500 in default S.I. for one month for the offence under Section 498 of the Indian Penal Code; and S.I. for one year and fine of Rs.500 in default S.I. for one month for the offence under Section 201 of the Indian Penal Code, which has given rise to filing of the present appeal by the appellant.

6. Learned counsel, Mr. Jayant M. Panchal, appearing for the appellant, and learned Additional Public Prosecutor, Mr. A.J. Desai, have taken us through the entire evidence produced by the prosecution.

7. It is contended by the learned counsel for the appellant that there are two sets of dying declaration, one in favour of the appellant and another against him, and, therefore, benefit of doubt should be extended in favour of the appellant. It is contended by the learned counsel for the appellant that the statement of deceased Dakshaben made before P.W.13, PSI, S.B.Trivedi, had become dying declaration after her death and the dying declaration recorded by the Executive Magistrate, at Kadi (Exh.71) was first in point of time and the Court should rely upon this document for holding that the appellant had not poured kerosene on the deceased and she had sustained accidental burn injuries while she was preparing tea. It is contended by the learned counsel for the appellant that, even though PSI, S.B. Trivedi, and the social worker, Ritaben Vyas, PW 11, had admitted in evidence that such statement and dying declaration were made by deceased Dakshaben at Kadi, the prosecution with a view to suppress the dying declaration recorded by the Executive Magistrate did not produce it on the record nor examined the Executive Magistrate. It is submitted that the learned Additional Sessions Judge was convinced that the said dying declaration was made by the deceased at Kadi immediately after the incident and, therefore,

had admitted it in evidence at Exh.71. It is submitted by the learned counsel for the appellant that the said dying declaration made by the deceased produced at Exh.71 was a truthful and convincing statement made by the deceased immediately after the occurrence of the incident which disclosed that the deceased had sustained burn injuries while she was preparing tea at her residence at village Narsinhpura around 10 p.m. on June 6, 1993. It is contended by the learned counsel for the appellant that when there were two inconsistent dying declarations, the benefit of doubt should go in favour of the accused-appellant. It is further contended by the learned counsel for the appellant that when there were inconsistencies and infirmities in two dying declarations, the Court should be reluctant in accepting the dying declaration involving the appellant and the benefit of doubt should go in favour of the appellant. In support of the submission, the learned counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of Arvind Singh vs. State of Bihar, reported in 2001 Supreme Court Cases (Cri) 1148.

8. The learned Additional Public Prosecutor, Mr. A.J. Desai, on the other hand, has submitted that the deceased was under the pressure and influence of the appellant while she was admitted at Bhagyoday Hospital, at Kadi, and she had made statement before PSI, S.B. Trivedi, and had given dying declaration before the Executive Magistrate at Kadi under the pressure of the appellant as the appellant had given threat that her daughter would be met with the same fate if she does not give the statement that she had sustained burn injuries while she was preparing tea. The learned Additional Public Prosecutor has further submitted that the statement and the dying declaration made by the deceased at Kadi were not truthful and, therefore, the learned Judge was justified in discarding the same. It is contended that, as soon as the relatives of the deceased arrived at the hospital of Dr. Jarmarwala, at Ahmedabad, the deceased had made statement and had given dying declaration before the Executive Magistrate that, as she was under pressure and threat of the appellant, she was made to say that she had sustained injuries while preparing tea but in fact had sustained injuries as a result of the appellant pouring kerosene on her and setting her ablaze. The learned Additional Public Prosecutor has further submitted that the oral evidence of the father, P.W.4, Himmatlal Bhatt, and the brother, P.W.5, Prakash Bhatt, proved beyond doubt that the deceased was meted out with cruelty by the appellant. The learned Additional Public Prosecutor has submitted

that, if the Court finds that the earlier dying declaration made by the deceased is not truthful and trustworthy then it is open for the Court to rely on the subsequent dying declaration given by the deceased on her own free will after she had come out of the pressure, influence and threat of the appellant. In support of the contention, The learned Additional Public Prosecutor has placed reliance on the decision of the Supreme Court in the case of Harjit Kaur vs. State of Punjab, reported in AIR 1999 Supreme Court 2571. It is contended by the learned Additional Public Prosecutor that the deceased, who was a young graduate girl, had met with tragic death within two years of the marriage with the appellant, and, in view of the satisfactory evidence led by the prosecution to prove the charge against the appellant, the appeal should be dismissed.

9. We have considered the submissions advanced at the Bar and reappreciated the whole evidence on record. As the whole case of the prosecution against the appellant is based on two sets of dying declarations made by the deceased, it would be worthwhile to notice the law on dying declaration.

10. Section 32(1) of the Indian Evidence Act, 1874, is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit-worthy. Under section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness, is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the

verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time, every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witness testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true; (i) Whether the victim was in a position to identify the assailant/s ? (ii) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ? and (iii) Whether any material part is proved to be false by other reliable evidence ? In Khushal Rao vs. State of Bombay, 1958 SCR 552 = AIR 1958 SC 22, the law on the subject has been clearly and succinctly enunciated by the highest Court of the land as under:

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts

in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence, (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers and as far as practicable, in the words of the maker of the declaration, stands on much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

11. From the principles enunciated by the Supreme Court in the above-quoted decision, it is evident that each case has to be determined on its own facts keeping in view the circumstances in which the dying declarations were made. Bearing in mind the above-referred to well settled principles, which should be applied to a case based on the dying declarations, we now proceed to

consider the evidence adduced by the prosecution against the appellant in the form of the dying declarations of the deceased.

12. P.W.2, Dr. Tejas Laxmanbhai Patel of Bhagyoday Hospital, in his substantive evidence before the Court, has stated that deceased Dakshaben was brought to the Hospital at 11.45 p.m. on June 6, 1993 in the burnt condition for the treatment of the burn injuries and she had informed him that, 'she had sustained burn injuries while she was preparing tea'. According to him, he had sent a report to the Police Station at Kadi. The said report was admitted in evidence at Exh.23. He also deposed that the appellant had also sustained injuries on his hands and for that he was given treatment at the Hospital. He also deposed that he had sent yadi that the patient was conscious and was in a fit state of mind to give statement. It may also be noted that the said yadi was also signed by P.W.11 Ms. Ritaben Vyas who is also a social worker and a practising advocate at Kadi. After receipt of the yadi, the Executive Magistrate, Kadi, had recorded dying declaration of deceased Dakshaben. The said dying declaration was suppressed by the prosecution and they did not examine the Executive Magistrate who had recorded the said dying declaration, but, as per the oral evidence of P.W.13, PSI, S.B. Trivedi and the social worker P.W.11 Ms. Ritaben Vyas, the said dying declaration was rightly admitted in evidence by the learned Additional Sessions Judge at Exh.71. As per the said dying declaration recorded by the Executive Magistrate at Kadi, deceased Dakshaben had made statement that on June 6, 1993, at 10 p.m. while she was preparing tea on the stove, her saree caught the flames of the stove and, therefore, she had sustained the burn injuries. She categorically stated that she had no quarrel with any of the family members and they had not set her ablaze by pouring kerosene. The recording of dying declaration commenced at 0.40 hrs and was completed on 1.00 hrs on June 7, 1993.

13. After the report was sent by Dr. Tejas Patel, to Kadi Police Station, P.W.13, PSI, S.B. Trivedi, visited Bhagyoday Hospital and recorded statement of deceased Dakshaben. The statement had also become a dying declaration after the death of deceased Dakshaben. The said statement recorded by P.W.13 PSI, S.B.Trivedi, is produced at Exh.58 on the record of the case. An endorsement was made by Dr. Tejas Patel at 12.30 a.m. on June 7, 1993. In the said statement also, deceased Dakshaben had stated that she was married with the appellant prior to two years of the incident and she was

having one female child out of the said wedlock. She stated that she was preparing tea at around 10 p.m. on the stove and due to catching of flame by the saree put on by her, she had sustained burn injuries. She also stated that she had good relation with the appellant, her mother in law and father in law. At the end of the statement, she stated that there was no harassment or cruelty by the appellant or her in-laws. The said statement was also signed by the social worker, Ritaben Vyas, who was examined by the prosecution as P.W.11, Exh.50.

14. The first set of evidence we have before us, is the oral dying declaration made by deceased Dakshaben before Dr. Tejas Patel, and the statement recorded by P.W.13 PSI, S.B. Trivedi, Exh.58, which were duly endorsed by the social worker, P.W.11, Ms. Ritaben Vyas (Pancholi) and having endorsement of Dr. Tejas Patel that the patient was conscious. The another piece of evidence is the dying declaration Exh.71 recorded by the Executive Magistrate, Kadi, of deceased Dakshaben in Bhagyoday Hospital at Kadi. This first set of evidence absolves the appellant as stated by deceased Dakshaben at Kadi.

15. The deceased was, as per the prosecution case, transferred to the Civil Hospital, Ahmedabad, by Dr. Tejas Patel, as her condition was serious. The medico-legal case certificate issued by Dr. Tejas Patel with regard to the injuries sustained by the deceased produced at Exh.24 also indicates that the deceased was advised to be transferred to the Civil Hospital, Ahmedabad. The evidence of P.W.4, Himatlal Jatashanker Bhatt, and P.W.5, Prakash Himatlal Bhatt, who are father and brother of the deceased, also shows that the deceased was transferred to the Civil Hospital, Ahmedabad, and was, in fact, admitted in the Civil Hospital, but, surprisingly enough, the prosecution has not produced the case papers of the Civil Hospital, Ahmedabad. It is not brought on the record of the case that, under what circumstances, or under whose advice, she came to be transferred to the private hospital of Dr. Jarmarwala. It becomes evident from the oral deposition of P.W.1 Dr. Jarmarwala that the deceased was brought to his Hospital with burn injuries of 97% and she was accompanied by one Pratimaben. In cross examination, Dr. Jarmarwala deposed that said Pratimaben, who was sister of the father of deceased Dakshaben, was known to him since long as previously one of her relatives was admitted in his hospital. In cross examination, he admitted that, before admitting deceased Dakshaben in his hospital, an enquiry

was made by Pratimaben and her younger brother whether deceased Dakshaben would be admitted in his hospital. He also admitted that, from Bhagyoday Hospital, Kadi, deceased Dakshaben was transferred to the Civil Hospital, Ahmedabad. Dr. Jarmarwala did not ascertain from deceased Dakshaben as to how she had sustained burn injuries. The case papers of Jarmarwala Hospital are surprisingly not produced by the prosecution even though deceased Dakshaben had remained in the Hospital from June 7, 1993 to June 14, 1993 when she expired. One prescription was produced by the prosecution during the deposition of Dr. Jarmarwala at Exh.29 which only indicates the drugs prescribed by Dr. Jarmarwala for the treatment of the burn injuries. Dr. Jarmarwala before admitting the patient has not recorded the history as to how the deceased sustained burn injuries. Along with the deceased, the appellant, Kaushik Kumar, who had also sustained burn injuries on both the hands, was also admitted as an indoor patient in the Hospital. The injury certificate issued by Dr. Jarmarwala showing the burn injuries sustained by the appellant is produced at Exh.25, and the injury certificate issued by Dr. Tejas Patel of Bhagyoday Hospital, Kadi, is produced at Exh.20. The certificate issued by Dr. Jarmarwala indicates that the appellant was admitted in his hospital on June 7, 1993 at 11.30 a.m. and was discharged on June 11, 1993 at 6 p.m. with the advice of dressing on alternative days. It has come on record that the relatives of the deceased, namely, her father and brother had arrived at the Hospital of Dr. Jarmarwala on June 7, 1993 as soon as she was admitted in the hospital. Till the night of June 10, 1993, even though the relatives of the deceased were present in the Hospital of Dr. Jarmarwala, the deceased had never stated that she was set ablaze by the appellant by pouring kerosene. According to the oral evidence of P.W.4, Himatlal Jatashanker Bhatt, father of the deceased, and P.W.5, Prakash Himatlal Bhatt, brother of the deceased, on the night of June 10, 1993, when the deceased was asked how she sustained such serious injuries, had disclosed for the first time that the appellant had poured kerosene on her and set her ablaze. The second set of evidence, thus, consisted of two oral dying declarations made by the deceased before P.W.4 and P.W.5 (father and brother) implicating the appellant of the offence of pouring kerosene on her and setting her ablaze. Immediately thereafter, P.W.5, accompanied by his relative Ashwinbhai Jani, who was serving in the Office of the Director General of Police, had gone to the Ellisbridge Police Station, but he was advised to go the Kadi Police Station as the incident had taken place in the jurisdiction of Kadi Police Station. P.W.5, Prakash

Himatlal Bhatt, accompanied by Ashwinbhai Jani, thereafter, went to Kadi Police Station and made report before PSI, S.B. Trivedi, which is admitted in evidence at Exh.37. The said report was lodged at 2.30 a.m. on June 11, 1993. After receipt of the report, P.W.13 PSI, S.B.Trivedi, immediately contacted social worker, P.W.11 Ms. Ritaben Vyas and they visited the hospital of Dr. Jarmarwala, at Ahmedabad. In the hospital of Dr. Jarmarwala, the statement of the deceased was recorded by P.W.13 PSI, S.B. Trivedi, which is produced at Exh.16, and which is also admitted in evidence at Exh.59. As per the said statement, the deceased had stated before PW 13 PSI Trivedi that her statement and dying declaration recorded at Kadi were not voluntary as she was under pressure and influence of the appellant and his relatives. She declared that she was meted out with cruelty by the appellant and his mother and, on the date of the incident, there was quarrel between the mother of the appellant and the deceased, and the appellant had got enraged and poured kerosene on her and set her ablaze. She also stated that when she tried to come out of the kitchen, the appellant with both his hands had pushed her inside the kitchen. She stated that when she had raised shouts, the neighbours had collected and had tried to extinguish the fire. In the statement, she also stated that the appellant had called a jeep to take her to the Hospital at Kadi, and, on the way to the Hospital, the appellant had threatened her that, 'if she gives statement against him or his mother, he would see to it that her daughter, Krupa, is also met with the same fate'. In the said statement, she categorically stated that the appellant and her mother in law had set her ablaze to kill her and she had not sustained the burn injuries by any accident. This statement is also signed by the social worker, P.W.11 Ritaben Vyas. There is an endorsement to the effect that the patient is conscious at 4.30 a.m. on June 11, 1993.

16. The record further indicates that immediately a yadi was sent to the Executive Magistrate by the Ellisbridge Police Station to record dying declaration of deceased Dakshaben. The said yadi was endorsed by Dr. Jarmarwala that the patient was conscious at 11.10 a.m. on June 11, 1993. The said yadi was received by P.W.3, Rameshchandra Purshotamdas Patel, Executive Magistrate, at 12.40 p.m. He immediately went to the hospital of Dr. Jarmarwala and ascertained whether the patient was conscious and in a fit state of mind. Thereafter, he had gone to the place where the patient was kept and had instructed the relatives and other persons to go away from the room. Thereafter, he had started recording

statement of deceased Dakshaben at 1.05 p.m. He deposed that, after the dying declaration was recorded, he could not take the thumb impression of the left hand of deceased Dakshaben as her hands were having bandage and, therefore, he had taken the thumb impression of the left foot on the dying declaration. The said dying declaration of deceased Dakshaben recorded by P.W.3, R.P. Patel, bears an endorsement that the said declaration was recorded in presence of one I.H. Dave, Clerk serving in a office in "B" Block, M.S. Building, Ahmedabad, and one Manjula Vyas. The said two witnesses had signed below the dying declaration as attesting witnesses. None of the said witnesses is examined by the prosecution before the Sessions Court. It is surprising that the copy of the dying declaration, which was supplied to the appellant along with the chargesheet, did not bear the signatures of the attesting witnesses as stated above. The evidence, as discussed above, reveals that the second set of evidence implicating the appellant and his mother (original accused No.2) are consisting of (1) the oral dying declaration made by the deceased before her father and brother, (2) the complaint recorded by P.W.13 PSI, S.B.TRIVEDI S.B.Trivedi, which had become dying declaration after the death of deceased Dakshaben, and (3) the dying declaration recorded by P.W.3, Executive Magistrate, Mr. R.P. Patel.

17. As observed earlier, before the dying declaration can be made basis for conviction, the Court should be satisfied that the dying declaration is trust-worthy. The second set of dying declaration oral as well as documentary, in our opinion, does not inspire confidence and cannot be made basis for convicting the appellant of the charge under Section 302 of the Indian Penal Code. The parents and the brother of deceased Dakshaben were in her company since she was admitted in the Hospital of Dr. Jarmarwala on June 7,1993. It is difficult to believe the story of the prosecution that deceased Dakshaben disclosed for the first time on the night of June 10, 1993 that the appellant and his mother had set her ablaze by pouring kerosene on her. The dying declaration recorded by P.W.3, R.P. Patel, Executive Magistrate, also does not inspire confidence that the said dying declaration was made voluntarily. The inconsistency found in the original dying declaration produced at Exh.30 and the copy EXh.31 supplied to the appellant along with the chargesheet also raises serious doubt about genuineness of the dying declaration, as, in the copy supplied to the appellant, the signatures of the attesting witnesses were not found. Normally, at the time of recording of dying declaration and on completion

of the said dying declaration, no signatures of attesting witnesses are obtained. The endorsement of the Doctor is obtained at the end of the dying declaration that the patient at the time of making declaration was conscious and in a fit state of mind. Such abnormal procedure adopted by the Executive Magistrate of obtaining signatures of the attesting witnesses and non-examination of the said attesting witnesses also raises serious doubts about the genuineness of the dying declaration recorded by P.W.3, R.P. Patel, Executive Magistrate, Ahmedabad City. The prosecution case also suffers from serious infirmities on the ground that even though the deceased was taken to the Civil Hospital, Ahmedabad, from Bhagyoday Hospital, Kadi and was admitted in the Civil Hospital, Ahmedabad, no case papers of the Civil Hospital are produced on the record. The father and the brother of the deceased have orally deposed that, when they went to Bhagyoday Hospital, Kadi, they were informed that the deceased was transferred to the Civil Hospital, Ahmedabad, and had, in fact, gone there, where, they were informed that the deceased was taken to the hospital of Dr. Jarmarwala from the Civil Hospital. Thus, it is the case of the prosecution that the deceased was admitted in the Civil Hospital, Ahmedabad, but no record is produced. This also raises serious doubt about the prosecution case.

18. In the above set of circumstances, the question which arises for consideration of the Court is as to whether conviction of the appellant can be upheld when two sets of evidence led by the prosecution contradict each other. In Harchandsinh and another vs. State of Haryana, reported in AIR 1974 Supreme Court 344, two accused were arraigned in the assault on the deceased, as a result of which latter had died. The prosecution, in support of its case, had examined two sets of eye witnesses. The evidence of one set consisted of the testimony of the three eye witnesses who were not present at the time of occurrence, according to the fourth eye witness, who, according to the prosecution case, was with the deceased at the time of assault. The evidence of the fourth eye witness was also shown to be unreliable evidence led by other evidence produced by the prosecution. Under the circumstances, the Supreme Court has held that it was a case wherein one set of evidence condemned the other set of evidence leaving the Court with no reliable and trustworth evidence upon which the conviction of the accused might be passed. The principle emerging from the above quoted decision of the Supreme Court is that in a case where the prosecution leads two sets of evidence, each one of which contradicts the

other, it is difficult to found conviction of the accused. Applying the above principle to the facts of the case, we find that the prosecution has led two sets of evidence each one of which contradicts the other. By leading one set of evidence which is in the form of oral dying declaration recorded by Executive Magistrate, Kadi, at Exh.71 and recorded by Dr. Tejas Patel, the statement recorded by P.W.13 PSI, S.B.Trivedi, Exh.58 and the dying declaration, the prosecution wants the Court to believe that the deceased had received burn injuries accidently, whereas by leading evidence in the form of the two oral dying declarations of the deceased made before the father and brother, statement made before P.W.13 PSI, Trivedi Exh.16 and the dying declaratino Exh.36 recorded by the Eecutive Magistrate,Mr. R.P. Patel, the prosecution wants the Court to believe that the appellant had poured kerosene on her and killed her by setting her ablaze.
In view of this contradictory evidence on record, it is difficult to sustain the conviction of the appellant.

19. The decision on which reliance is placed by the learned Additional Public Prosecutor, in the case of Harjit Kaur (supra) is quite distinct from the facts of the present case. In the case of Harjit Kaur (supra) the deceased had made the first statement where she did not involve her in-laws and her husband, as she was under the influence of her in-laws. In that case, the deceased had sustained burn injuries at 2 a.m. and she was not immediately taken to the hospital and the in-laws waited till 7.30 a.m. Furthermore, the parents of the deceased were not informed immediately. In the present case, deceased Dakshaben was immediately taken to Bhagyoday Hospital, at Kadi, in a jeep, and the parents of the deceased were also informed by the appellant. The second set of dying declaration made by the deceased is full of infirmities and inconsistencies and, therefore, it cannot be said that the first dying declaration was not made at the free will of the deceased and she was under the influence and pressure of the appellant-husband and his relatives. The second set of dying declaration involving the appellant and his mother is found not to be trustworthy and, therefore, the decision, on which the reliance is placed by the learned Additional Public Prosecutor, in the case of Harjit Kaur (supra), will not apply to the facts of the present case.

20. In the statement, which was recorded by PSI, S.B. Trivedi, Exh.16 [equivalent to Exh.59], deceased Dakshaben had stated that, after pouring kerosene on her and setting her ablaze, when she had tried to come out of

the kitchen, the appellant with his both the hands had pushed her inside the kitchen and, as she had raised shouts, the neighbours had come to her rescue and had extinguished the fire. In her dying declaration before the Executive Magistrate Exh.30, she had stated that, after setting her ablaze, the appellant had caught hold of her with both her hands. The statement made before PSI, S.B. Trivedi, and the statement given in the dying declaration are also, in our view, contradictory which also raises serious doubt about genuineness of the dying declaration which consisted of the second set of evidence implicating the appellant. It also should be borne in mind that on the same set of circumstances, the original accused no.2, mother of the appellant, came to be acquitted by the learned Additional Sessions Judge, which was confirmed by the High Court in Criminal Appeal No.674 of 1994, which came to be dismissed on July 22, 1996. After the deceased was admitted in the hospital of Dr. Jarmarwala, her condition was deteriorating day by day. As per the prescription produced by Dr. Jarmarwala, the deceased was under heavy intoxication and was administered heavy sedatives and she might not be under a fit state of mind. It would be hazardous to hold that, when she made statement Exh.16 before P.W.13 PSI, S.B. Trivedi, and the dying declaration Exh.30 before the Executive Magistrate, she was in fit state of mind keeping in the background of the infirmities and inconsistencies found in the statements and the dying declaration as noted earlier. Under the circumstances, it would not be prudent to act upon the said dying declaration. Non-examination of Manjulaben Vyas, I.S. Dave, Ashwinikumar Jani and the neighbours who had visited first the place of the incident, also raises serious doubts abut the prosecution case that the appellant was guilty of pouring kerosene and setting the deceased ablaze and thereby the appellant committed murder of deceased Dakshaben. In view of the above set of conflicting evidence, we are of the opinion that the conviction of the appellant under Section 302 of the Indian Penal Code recorded by the learned Additional Sessions Judge and consequential sentence imposed upon the appellant of R.I. for life, is required to be set aside and quashed by giving benefit of doubt in favour of the appellant.

21. The conviction of the appellant under Section 201 of the Indian Penal Code of destroying evidence by washing place of incident is also based on no evidence. The panchanama of place of incident only shows that the place of incident was washed away. The panch witnesses of the panchanama did not support the prosecution case

that, in their presence, the panchanama of place of incident was drawn. Even if the evidence of P.W.13 PSI, S.B. Trivedi, is relied upon to admit the panchanama in evidence and to hold that the place of incident was washed away and the evidence was destroyed, but, there is no evidence connecting the appellant with destroying the evidence. The conviction cannot be based on mere hypothesis and conjectures. In the absence of the legal evidence, in our view, the appellant cannot be held liable or cannot be convicted for the offence under Section 201 of the Indian Penal Code and, therefore, we are of the opinion that the conviction recorded by the learned Additional Sessions Judge and consequential sentence imposed upon the appellant under Section 201 of the Indian Penal Code, is also required to be set aside and quashed.

22. The oral evidence of P.W.4, Himatlal Jatashanker Bhatt, which is supported by the oral evidence of P.W.5, Prakash Himatlal Bhatt, who are father and brother of deceased Dakshaben, proves that the deceased was meted out with cruelty by the appellant and his mother. The post-card produced by the prosecution at Exh.33, which was written by deceased Dakshaben to her father, which bears the postal mark of 12.10.1991, indicates that her in laws were taunting her that, as there was no correspondence from her parents inquiring about her well-being and, thereby, were causing cruelty to her. She also complained that she was not much comfortable in the village Narsinhpura. However, her destiny made her to suffer. Another letter produced by the prosecution is at Exh.32 which is written by the father, P.W.4, Himatlal Jatashanker Bhatt, on November 19, 1992 to the father-in-law of the deceased. In this letter, the deceased was advised to change her nature and to get her adjusted with the atmosphere of her family. In this letter, P.W.4 had given opinion that the appellant was very obedient and practical and, therefore, they were not worried about the deceased. The oral evidence, coupled with the documentary evidence of these two letters, produced at Exh.33 and Exh.34, in our view, do not constitute offence under Section 498A of the Indian Penal Code. Therefore, we are of the opinion that the conviction recorded by the learned Additional Sessions Judge and consequential sentence imposed upon the appellant under Section 498A of the Indian Penal Code, also requires to be quashed and set aside.

23. In view of the above discussion, a reasonable doubt arises regarding guilt of the appellant and,

therefore, the appellant is entitled to a reasonable benefit of doubt.

24. For the foregoing reasons, the appeal succeeds. The judgment and order dated February 9, 1994, passed by the learned Additional Sessions Judge, Mehsana, Camp at: Patan, in the Sessions Case No.203 of 1993, by which order, the appellant is convicted under Sections 302, 498A and 201 of the Indian Penal Code is hereby set aside and quashed and, by giving reasonable benefit of doubt, the appellant is acquitted. The Jail Authorities are directed to release the appellant from the jail forthwith, unless his presence is needed with reference to any other case pending against him. The appeal is accordingly allowed. The muddamal be disposed of in terms of the directions given by the learned Judge of the trial court in the impugned judgment.

June 24, 2002 (M.H. Kadri, J.)

(Sharad D. Dave, J.)
(swamy)